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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DANIEL LONG,

Plaintiff and Appellant,

v.

FORTY NINERS FOOTBALL
COMPANY, LLC,

Defendant and Respondent.

H042136

(Santa Clara County

Super. Ct. No. 2014-1-CV-268782)

This appeal arises from the fifth personal injury action filed by plaintiff Daniel Long after he was assaulted following a professional football game. After litigating an action for almost two years in San Francisco County Superior Court against respondent Forty Niners Football Company, LLC (then known as San Francisco Forty Niners, Ltd., and hereafter referred to as Forty Niners), Long voluntarily dismissed his state action to pursue remedies in federal court. The federal district court dismissed his initial attempt without prejudice for lack of diversity jurisdiction. He filed again in San Francisco County Superior Court, which sustained a demurrer without leave to amend on the grounds the action was time-barred. Long filed a second federal case, which the district court dismissed for lack of federal question and diversity jurisdiction, affording Long leave to refile in state court; Long filed the underlying action in Santa Clara County Superior Court, raising causes of action for breach of contract, negligence, malice and punitive damages, and liability under the rescue doctrine. The Santa Clara County court sustained the Forty Niners' subsequent demurrer to three of the four causes of action

without leave to amend on the grounds his claims for negligence, malice and punitive damages, and rescue doctrine liability were barred by the relevant statute of limitations.

On appeal, Long argues the trial court erred in doing so, as he filed the Santa Clara County case within 30 days after the district court dismissed his second federal action, and the district court's order allowed him to refile in state court. To the extent his claims were time-barred, Long contends the trial court should have allowed him leave to amend his complaint to plead around the statute of limitations. As the trial court properly sustained the demurrer without leave to amend, we affirm the resulting judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 20, 2011, an unknown assailant shot Long in the parking lot at Candlestick Park, following a professional football game between the San Francisco Forty Niners and the Oakland Raiders. Long filed a complaint against the Forty Niners, the National Football League, and Landmark Security, Inc., in San Francisco County Superior Court in November 2011 (the first San Francisco action), alleging breach of contract, negligence, and liability under the rescue doctrine.¹ “In June 2013, Long

¹ We hereby grant the Forty Niners' request for judicial notice, filed July 20, 2018, and take judicial notice of the following pursuant to Evidence Code sections 452, subdivisions (c) and (d), and 459: complaint filed in *Daniel Long v. San Francisco 49ers Ltd, et. al*, case No. CGC-11-516226, filed on November 30, 2011, in San Francisco County Superior Court; complaint filed in *Daniel Long v. Forty Niners Football Company and John York*, case No. 3:13-CV-02919-EMC, filed June 25, 2013, in United States District Court for the Northern District of California; complaint filed in *Daniel Long v. Forty Niners Football Company, LLC*, case No. CC-13-535439, filed on November 12, 2013, in San Francisco County Superior Court; complaint filed in *Daniel Long v. Forty Niners Football Company, LLC*, case No. C-14-01787-JST, filed on April 17, 2014, in the United States District Court for the Northern District of California; order filed July 17, 2014, dismissing *Daniel Long v. Forty Niners Football Company, LLC*, case No. C-14-01787-JST for lack of subject matter jurisdiction; and the original complaint filed in the underlying lawsuit, *Daniel Long v. Forty Niners Football Company, LLC*, case No. 2014-1-CV-268782, filed on August 1, 2014, in Santa Clara County Superior Court. The trial court took judicial notice of all these pleadings, except for the Santa Clara County complaint, in ruling on the subject demurrer.

learned that the San Francisco Forty Niners, Ltd., had converted into a Delaware limited liability company, the Forty Niners Football Company, LLC. On June 25, 2013, Long filed a complaint against the Forty Niners Football Company, LLC, and John York, the general partner of the San Francisco Forty Niners, Ltd., in the United States District Court for the Northern District of California [the first federal action]. Long’s federal suit was identical to his state suit, except he sued the Forty Niners Football Company, LLC, and John York instead of the San Francisco Forty Niners, Ltd.” (*Long v. Forty Niners Football Co., LLC* (2019) 33 Cal.App.5th 550, 553 (*Long*).)² In July 2013, less than a month before the date set for trial, Long voluntarily dismissed his first San Francisco action. (*Ibid.*) The district court dismissed the first federal action without prejudice upon finding it lacked subject matter jurisdiction based on a lack of complete diversity between Long and all of the defendants.

On November 12, 2013, Long filed a second action in San Francisco County Superior Court against the Forty Niners (the second San Francisco action), asserting the same causes of action as in the first San Francisco case, but adding a claim for malice and punitive damages. The San Francisco court sustained the Forty Niners’ demurrer to the tort causes of action without leave to amend, finding they were time-barred as Long did not file the complaint by August 20, 2013, two years from the date of his injury; the court rejected Long’s argument that the statute of limitations was equitably tolled while the first federal action was pending. (*Long, supra*, 33 Cal.App.5th at p. 553.) The First District Court of Appeal affirmed the trial court’s ruling, determining that Long had not

² The First District Court of Appeal filed its opinion in *Long, supra*, 33 Cal.App.5th 550, on March 26, 2019, after the parties had fully briefed the instant appeal. The Forty Niners brought the opinion to this court’s attention in the manner authorized by California Rules of Court, rule 8.254. Long thereafter submitted correspondence seemingly objecting to this court’s reliance on the First District’s opinion, as he had filed a petition for rehearing. As of the date of filing of our opinion, the First District’s opinion in *Long* is final; they have not issued an order granting Long’s request for rehearing. (Cal. Rules of Court, rule 8.264(b).)

met his burden to show reasonable and good faith conduct that would support the application of the doctrine of equitable tolling. (*Id.* at pp. 555-556.) It also ruled that 28 United States Code section 1367(d) did not apply to the first federal action, and thus did not toll the statute of limitations for the second San Francisco action, as Long “did not appeal to the federal court’s supplemental jurisdiction.” (*Id.* at p. 558.)

On April 17, 2014, Long filed a second complaint in the United States District Court for the Northern District of California (the second federal action), asserting two federal causes of action in addition to the four state causes of action previously alleged in the second San Francisco action. Long alleged his filing related back to the June 25, 2013 complaint he filed in the first federal action, as the district court dismissed that action without prejudice. Long filed a first amended complaint, which the district court dismissed without prejudice in June 2014, finding that his civil rights, negligence, punitive damages, and rescue doctrine claims were time-barred, and that the second federal action did not relate back to the first federal action under Federal Rule of Civil Procedure 15(c). Long filed a second amended complaint on July 16, 2014; the district court dismissed that complaint, “without prejudice to refiling in state court,” on the grounds it lacked federal question jurisdiction and subject matter jurisdiction based on a lack of diversity.

Long filed his fifth complaint against the Forty Niners on August 1, 2014, in Santa Clara County Superior Court; his first amended complaint, filed September 5, 2014, is the operative petition underlying the instant appeal. The first amended complaint reiterated causes of action for breach of contract, negligence, malice and punitive damages, and liability under the rescue doctrine, the same causes of action alleged in the other lawsuits. Relevant to the instant appeal, Long alleged: “On June 25, 2013, plaintiff filed [the first federal action], and on October 23, 2013 the case was dismissed without prejudice because of the absence of complete diversity. On April 17, 2014, plaintiff filed [the second federal action] alleging federal question jurisdiction and supplemental jurisdiction

over the state law claims arising from the shooting. . . . On July 17, 2014, the court entered its ordered [*sic*] dismissing plaintiff's case against the defendant without prejudice to the plaintiff refiling in state court. The plaintiff timely filed the complaint herein on August 1, 2014 as required by 28 U.S.C. 1367(d) which tolled the two year statute of limitations for 30 days following the dismissal order. The time for the defendant to appeal the district court's order has run and the order allowing the filing of this case is now final."

The Forty Niners demurred to the first amended complaint, contending, among other grounds, that each of the tort causes of action were time-barred under the applicable statute of limitations. In response to the demurrer, Long argued the trial court was bound by the order issued by the district court in the second federal action allowing refiling in state court. The trial court sustained the demurrer without leave to amend as to the tort causes of action,³ as it determined 28 United States Code section 1367(d) did not serve to toll the statute of limitations because Long filed the second federal action after the statute of limitations had already expired. Moreover, the court found the district court's order allowing refiling in state court was not *res judicata* on the issue of the statute of limitations, as there was no indication the district court ruled on dismissing the second amended complaint.

The Santa Clara County court issued a written order sustaining the demurrer on November 25, 2014; it entered judgment in favor of the Forty Niners on December 16, 2014, dismissing the action in its entirety. The court subsequently denied a motion by Long for a new trial; the Forty Niners served notice of the entry of that order on

³ The trial court sustained the demurrer to the first cause of action for breach of contract with 10 days' leave to amend; per the court's judgment, Long did not amend the complaint within the permitted time. Long does not address this portion of the court's order in the instant appeal. We thus do not address the propriety of that order in this opinion. (See *Gonzales v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 804-805; *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1014-1015.)

February 23, 2015. Long timely noticed this appeal after entry of the order denying a new trial. (Cal. Rules of Court, rule 8.108(b).)

II. DISCUSSION

At issue in this appeal is the trial court's ruling sustaining the Forty Niners' demurrer to three causes of action without leave to amend: negligence, malice and punitive damages, and liability under the rescue doctrine. On appeal, Long argues the operative complaint in this case did not conclusively establish that his claims were barred by the statute of limitations. Moreover, he believes the district court's order in the second federal action is "conclusive as to refile in the state court," such that the doctrine of res judicata precludes this state's courts from dismissing the case on statute of limitations grounds. To the extent we find the trial court properly sustained the demurrer, Long argues it abused its discretion by denying leave to amend. We conclude the operative complaint conclusively establishes the subject causes of action were time-barred under the relevant statute of limitations. Long has not met his burden to show a reasonable possibility he could cure the defect by amending the complaint. We affirm the trial court's judgment dismissing Long's Santa Clara County action.

A. Standard of Review

In its recent opinion in *Long*, the First District Court of Appeal succinctly described the standard of review as follows: "We review de novo an order sustaining a demurrer and exercise our independent judgment to determine whether the complaint 'state[s] a cause of action on any available legal theory.' [Citation.] We accept the truth of all well-pled allegations in the complaint but not that of " " " 'contentions, deductions or conclusions of fact or law.' " " " [Citation.] When the trial court sustains a demurrer without leave to amend, we review the determination that amendment could not cure the defects in the complaint for abuse of discretion. [Citation.] We reverse only if the plaintiff establishes a reasonable possibility that the defects could be cured by amendment. [Citation.]" (*Long, supra*, 33 Cal.App.5th at p. 554.)

B. The Trial Court Correctly Sustained the Demurrer

Long contends the operative complaint in this case did not conclusively establish that his claims for negligence, malice and punitive damages, and liability under the rescue doctrine were barred by the applicable statute of limitations. Code of Civil Procedure section 335.1 prescribes a two-year statute of limitations for each of the causes of action at issue in this appeal, governing, “An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.” The statute of limitations began running at the time each cause of action “accrued”; tort causes of action accrue at the time of commission of the wrongful act, in this case the shooting. (Code Civ. Proc., § 312; *Howe v. Pioneer Mfg. Co.* (1968) 262 Cal.App.2d 330, 340.) Absent tolling, the statute of limitations on Long’s tort causes of action ran on August 20, 2013, as he was shot on August 20, 2011.

Long argues he filed the Santa Clara County case within the period allowed under section 1367(d) of title 28 of the United States Code⁴ after the district court dismissed his second federal action. “The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” (§ 1367(d).) Subsection (a) of section 1367 allows a federal court with “original jurisdiction” to have “supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”

The United States Supreme Court recently interpreted section 1367(d) as a “stop-the-clock” tolling provision, finding that a statute of limitations period for state claims is

⁴ All future undesignated statutory references are to title 28 of the United States Code.

suspended during the pendency of a federal suit involving the federal court's "supplemental jurisdiction" to hear state claims related to federal issues. (*Artis v. District of Columbia* (2018) ___U.S.___ [138 S.Ct. 594, 598, 199 L.Ed.2d 473, 480] (*Artis*).) Notably, when the plaintiff in *Artis* filed her federal action, "nearly two years remained on the applicable three-year statute of limitations" for her state claims. (*Id.* at p. 600.) As the federal court did not relinquish jurisdiction until two and a half years later, if the Supreme Court interpreted the statute otherwise, the plaintiff would have had only 30 days to refile in state court. (*Ibid.*) By comparison, the statute of limitations on Long's state claims in the instant matter expired before he filed the second federal action; the Supreme Court in *Artis* described as an "absurdity" the dissent's reading of the statute that would "permit a plaintiff to refile in state court even if the limitations period on her claim had expired before she filed in federal court." (*Id.* at p. 604.)

Absent tolling of the statute of limitations, Long had to file his action no later than two years after his causes of action accrued, or August 20, 2013. (Code Civ. Proc., § 335.1.) The operative complaint indicates Long filed his first federal action on June 25, 2013, just under two months before the statute of limitations on his state claims expired. Thus, if we apply *Artis* to the *facts* as plead in the operative complaint in this case, rather than the "contentions, deductions or conclusions of fact or law," once the federal court dismissed Long's first federal action on October 23, 2013, the remaining two months of the statute of limitations began running again 30 days after the court dismissed the action, such that the deadline was, at the latest, on or about January 22, 2014. Long did not file his second federal action until April 17, 2014, after the statute of limitations had already run. That the district court dismissed his first federal action without prejudice does not render his second federal action timely; the second federal action does not relate back to the first, as it is a complaint initiating a new action, rather than amending a prior complaint. (Fed. Rules Civ. Proc., rule 15(c)(1), 28 U.S.C.; *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111.)

Although Long asserts otherwise, this defect is clear from the facts as pled in the operative complaint in the Santa Clara County case. His causes of action accrued on August 20, 2011, the date he was shot. He filed his first federal case on June 25, 2013; the district court dismissed that case without prejudice on October 23, 2013. Rather than filing an amended complaint in the first federal action, Long filed a second, separate federal case on April 17, 2014, after the statute of limitations for the state causes of actions had run.⁵ While Long alleges he “timely filed” the Santa Clara County case “as required by” section 1367(d), that is a contention, deduction, or conclusion of law or fact, rather than a fact itself. On review, we are not required to accept such a conclusion. (*Long, supra*, 33 Cal.App.5th at p. 554.)

⁵ Although not mentioned in the operative complaint on appeal here, Long filed his second San Francisco action before filing the second federal action. In his appeal of the order denying the second San Francisco action as time-barred, Long argued the statute of limitations was equitably tolled while the first federal case was pending. (*Long, supra*, 33 Cal.App.5th at p. 554.) The First District Court of Appeal determined equitable tolling did not apply “where Long alleged that he voluntarily dismissed his first lawsuit, weeks before trial, to refile in federal court, and he fails to allege facts that would support the inference that he did so reasonably and in good faith.” (*Ibid.*) Long did not raise the issue of section 1367(d) to the trial court in the second San Francisco action; on appeal, he argued the trial court erred in denying leave to amend, alleging he could amend his complaint to assert that section 1367(d) rendered his suit timely. (*Id.* at p. 557.) The First District determined Long did not timely raise the issue, doing so for the first time in his reply brief. (*Ibid.*) Moreover, the appellate court found section 1367(d) did not apply to Long’s first federal action, as he “did not appeal to the federal court’s supplemental jurisdiction, nor did the federal court decline to exercise its supplemental jurisdiction over any of his claims.” (*Id.* at p. 558.) In the instant matter, Long alleged in the operative complaint that he raised “federal question jurisdiction and supplemental jurisdiction over the state law claims” in the second federal action. As we accept the facts as pled in the complaint, we assume section 1367(d) does apply to the second federal action, despite the district court’s statement in the July 2014 order dismissing that case that Long did not allege federal question jurisdiction in his second amended complaint, which was the complaint the district court dismissed with leave to refile in state court.

Nor need we accept Long's conclusion that the district court's "order allowing refiling of this case [was] final and binding" on the trial court. Long does not allege in the first amended complaint that the district court heard argument regarding the statute of limitations, or ruled on that issue in its order. However, Long asserts that the district court's order allowing refiling of this case was final and binding on the trial court with respect to the statute of limitations. In support of this contention, he cites *Martin v. Martin* (1970) 2 Cal.3d 752 (*Martin*), as well as other authorities. *Martin* holds that a federal court judgment has the same effect in courts of this state as it would in a federal court, such that the doctrine of res judicata precludes parties from relitigating in state court a cause of action that has been fully litigated on the merits by a federal court of competent jurisdiction. (*Id.* at pp. 761-762.) While federal court orders are binding on the state courts when the federal court makes a determination on the merits of an issue, the order in the second federal action did not address the merits of the statute of limitations defense. As a result, the state court was not bound by the district court's order.

Long argues the fact the district court knew of the procedural history of the case as it pertains to the statute of limitations requires this court to find that the district court ruled by implication on the timeliness of his filing of the July 2014 order by dismissing the case without prejudice to refiling in state court. Citing Code of Civil Procedure section 1908⁶ and Federal Rules of Civil Procedure, rule 60⁷, he contends the only way

⁶ Long specifically references subdivision (a)(2) of Code of Civil Procedure section 1908, which provides, "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: . . . [¶] . . . [¶] (2) In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

the Forty Niners could challenge the order was by raising the issue with the district court prior to its ruling becoming final under federal law; he believes the Forty Niners should have asked the district court to remove the provision allowing refiling in state court. But the authorities Long cites do not support his assertion that the federal court made implied findings regarding the application of the statute of limitations, or that such a burden should be imposed on respondents. (See *Stoll v. Gottlieb* (1938) 305 U.S. 165, 170-172 [where the federal court's jurisdiction to hear a matter was not challenged in federal court, a party could not raise such a challenge in a subsequent state court action based on the federal court's judgment]; *Martin, supra*, 2 Cal.3d at pp. 759, 761-762 [a federal bankruptcy court determination that payments owed by one spouse to another is not a dischargeable debt under bankruptcy law is res judicata on that issue in state trial court proceedings, as it was a final determination on the merits made by a court of competent jurisdiction, and could only be challenged in federal court]; *World Wide Imports, Inc. v. Bartel* (1983) 145 Cal.App.3d 1006, 1009, 1010-1011 [California trial court properly gave full faith and credit to Washington judgment where Washington court found appellants waived their right to a jury trial, as issue was fully litigated in Washington court].)

⁷ “On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: [¶] (1) mistake, inadvertence, surprise, or excusable neglect; [¶] (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); [¶] (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; [¶] (4) the judgment is void; [¶] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or [¶] (6) any other reason that justifies relief.” (Fed. Rules Civ. Proc., rule 60(b), 28 U.S.C.) “A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” (Fed. Rules Civ. Proc., rule 60(c)(1), 28 U.S.C.)

Considering the July 2014 order, we note that the district court permitted Long to refile in state court, which he did; the court did not include any language precluding the state court from sustaining a demurrer on appropriate legal grounds, including the applicable statute of limitations. Rather, the district court dismissed the action for lack of federal question jurisdiction. This jurisdictional ruling did not of necessity include any final determination of the merits of any state court claim or defense, and thus cannot be deemed to be res judicata on the issue of Long's compliance with the statute of limitations. “ ‘The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.’ [Citation.]” (*Martin, supra*, 2 Cal.3d at p. 758.) As the district court did not rule on the statute of limitations issue on the merits, its order allowing refiling is not res judicata on the issue.

Based on the above, we conclude the trial court properly sustained the Forty Niners' demurrer to the causes of action for negligence, malice and punitive damages, and liability under the rescue doctrine, as the facts as alleged in the first amended complaint conclusively established these causes of action were barred by the applicable statute of limitations.

B. The Court Did Not Abuse Its Discretion in Sustaining the Demurrer Without Leave to Amend

Long contends the trial court abused its discretion in sustaining the demurrer without leave to amend, as he believes there is a reasonable possibility he could cure the defect through amendment of the complaint. Specifically, Long argues he can plead that the Forty Niners should be equitably estopped from asserting a statute of limitations

defense, claiming, “ ‘A defendant may be equitably estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant’s actual identity.[’] *Bernson v. Browning-Ferris Industries*,[(1994)] 7 Cal. 4th 926, 936 [(*Bernson*)].” Long alleges he did not know the Forty Niners had converted from a California limited partnership into a Delaware corporation until June 2013; thus, he claims the statute of limitations should not have started running until he discovered the Forty Niners’ true “identity.”

We review the trial court’s order sustaining the demurrer without leave to amend for abuse of discretion. We determine “whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In support of his contention, Long specifies the facts he would allege if allowed to amend his complaint. He claims the owner of the football team at the time he filed the first San Francisco action was San Francisco Forty Niners, Ltd., a California limited partnership. In March 2012, the limited partnership ceased to exist, having been converted to a Delaware limited liability corporation under the name “Forty Niners Football Company, LCC [*sic*]”; Long did not know about the change, as the first San Francisco action continued to be litigated in the partnership’s name. The partnership demurred to the first San Francisco complaint in April 2012, and filed an answer in the first San Francisco action in May 2012. At that time, Long still did not know the team was “no longer owned by the California limited partnership.” “In March and June of 2013, the attorney acting as the director of legal affairs for the 49ers signed discovery verifications attesting to the fact that she was authorized to sign the verifications on behalf of the defendant, California limited partnership, even though it had abandoned the

partnership form more than a year earlier.”⁸ In April 2013, the California limited partnership filed a motion for summary judgment in the first San Francisco action; in preparing to oppose that motion, Long discovered “that the new owner was a Delaware entity,” leading him to file the first federal action in June 2013. Long also opposed the summary judgment motion on the ground the California limited partnership did not have standing to file such a motion because it no longer existed. “This lawsuit [the Santa Clara County action] was filed within two years from the discovery of the defendant owner’s identity-the shooting occurred on August 20, 2011, the identity of the owner was discovered in June, 2013 and the lawsuit was filed on August 1, 2014.”

Long has not put forth any facts that would show the Forty Niners intentionally concealed the change in structure from a California limited liability partnership to a Delaware limited liability corporation. “While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute. [Citations.]” (*Bernson, supra*, 7 Cal.4th at p. 932.)

In *Bernson*, the California Supreme Court considered whether this general rule should apply to a situation where, “as a result of the defendant’s *intentional concealment*, the plaintiff is not only unaware of the defendant’s identity, but is effectively precluded as a practical matter from ascertaining it through normal discovery procedures.”

⁸ We hereby grant in part Long’s request for judicial notice, filed August 23, 2018, and take judicial notice of the register of actions in the first San Francisco action, Exhibit 2 to his request. Long has not shown that Exhibits 1 or 3 to his request, pleadings from other cases filed in San Francisco County Superior Court naming the Forty Niners as parties, have any relevance to the instant proceeding. (Evid. Code, § 459, subd. (a); Cal. Rules of Court, rule 8.252(a)(2)(A).) Although Evidence Code section 452, subdivision (d) gives this court discretion to take judicial notice of records of any court of this state, Long has not shown that Exhibit 4, discovery verifications, were filed with the court in any action to which they related.

(*Bernson, supra*, 7 Cal.4th at p. 933, italics added.) In the latter half of 1988, the plaintiff in *Bernson* learned “he was the subject of a highly critical dossier circulating among the Los Angeles media.” (*Id.* at p. 929.) He did not learn the identity of the parties behind the dossier until early 1990, although those parties denied any involvement; in May 1991 the plaintiff obtained additional corroboration of the parties’ identity, filing a libel action against them less than a year later. (*Ibid.*) On appeal, plaintiff argued the trial court erred in sustaining a demurrer without leave to amend on the basis of the one-year statute of limitations, claiming the defendants should be estopped from asserting the statute of limitations because they “affirmatively concealed” their involvement with the dossier. (*Id.* at p. 930.)

The California Supreme Court determined “a defendant may be equitably estopped from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant’s actual identity. . . . [¶] The rule of equitable estoppel includes, of course, the requirement that the plaintiff exercise reasonable diligence. [Citation.] Thus, under our holding the statute will toll only until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant’s identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information. [¶] . . . [W]here the facts are such that even discovery cannot pierce a defendant’s intentional efforts to conceal his identity, the plaintiff should not be penalized.” (*Bernson, supra*, 7 Cal.4th at pp. 936-937.)

Here, Long does not allege the Forty Niners intentionally concealed the change in structure from a California partnership to a Delaware corporation. Addressing whether he acted diligently to determine the proper identity of the Forty Niners, Long contends he “was entitled to rely on the fact that” the Delaware corporation never appeared in the first San Francisco action, allowing the matter to proceed in the name of the California

partnership, as well as the fact the director of legal affairs signed two discovery verifications on behalf of the California partnership. Long does not cite any legal authority in support of this contention. “We repeatedly have held that the failure to provide legal authorities to support arguments forfeits contentions of error. [Citations.]” (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948.)

We agree with the Forty Niners that they were entitled by law to allow the action to proceed in the name of the California partnership. (Code Civ. Proc., § 368.5 [“An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.”]; see *Hearn Pacific Corp. v. Second Generation Roofing, Inc.* (2016) 247 Cal.App.4th 117, 133-134; *Davis v. Rudolph* (1947) 80 Cal.App.2d 397, 401 [absent a request for substitution, the case can proceed in the name of the original party, although the assignee has the right to control further proceedings in the action].)

Long argues the fact the Forty Niners did not have to voluntarily disclose the change is irrelevant to his equitable estoppel claim. We do not agree. Long bears the burden of demonstrating the Forty Niners intentionally concealed its identity such that it impeded his efforts to properly prosecute his action against it. That the Forty Niners could lawfully proceed with the first San Francisco action in the name of the California partnership despite the change in the organization’s business structure directly relates to the issue of whether any concealment was “intentional.” Moreover, it explains why the director of legal affairs signed verifications in the name of the California partnership, rather than the Delaware corporation. Long has not detailed any steps he took to determine the Forty Niners’ actual business structure; he simply states that at some point in 2013 he discovered the change from a California partnership to a Delaware corporation. He has not shown that he “vigorously pursued” “reasonably available

avenues of inquiry.” (*Bernson, supra*, 7 Cal.4th at p. 936.) We therefore conclude Long has not met his burden to show a reasonable possibility that he could amend his complaint to cure the statute of limitations defect. As a result, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

III. DISPOSITION

The judgment is affirmed.

Greenwood, P.J.

WE CONCUR:

Bamattre-Manoukian, J.

Danner, J.

Long v. Forty Niners Football Company, LLC
No. H042136